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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-982

DENNIS J. ROBERTS II,
ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND,
PETITIONER,

v.

THE NARRAGANSETT ELECTRIC COMPANY,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island.

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Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island.

Opinion Below.

The opinion of the Supreme Court of Rhode Island, not yet reported, appears in the Appendix hereto.

Jurisdiction.

The opinion of the Supreme Court of Rhode Island was entered on July 24, 1979. This Court granted one extension of

time in which to file the petition to and including December 21, 1979.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether the Supreme Court of Rhode Island used the correct standards in holding (1) that the Public Utilities Commission (PUC) acted illegally in voiding its order of January 27, 1972, and in ordering The Narragansett Electric Company to refund revenues paid by customers in excess of the rates originally intended by the PUC in its January 24, 1972, order and (2) that, although there was an illegal *ex parte* communication, the PUC was powerless to order refunds to the consumers who paid the excessive rates.

Constitutional Provision Involved.

FOURTEENTH AMENDMENT.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

PRIOR PROCEEDINGS.

This proceeding was commenced at the request of the Attorney General in the Rhode Island Public Utilities Commission

(PUC) to investigate whether The Narragansett Electric Company (Narragansett) had placed into effect and charged its customers under improper and excessive rates at the conclusion of Narragansett's general rate increase filing considered by the PUC. In its decision below, the PUC found that Narragansett had implemented unjust, unreasonable, and unlawful rates, and issued an order on August 21, 1978, directing Narragansett to refund to its customers the difference between what it collected under those rates and what it should have collected if it had charged proper rates.

Narragansett petitioned the Supreme Court of Rhode Island for a writ of certiorari to review and quash the August 21, 1978, order of the PUC. The Supreme Court granted the petition, quashed the PUC order and the case was remanded to the PUC.

STATEMENT OF FACTS.

This case arose when the Attorney General of Rhode Island asked the Rhode Island Public Utility Commission to investigate certain allegations that The Narragansett Electric Company, the State's largest supplier of electrical energy, had overcharged its customers by implementing an improper rate increase.

In November, 1970, Narragansett asked the PUC to permit it to increase its rates by $8,889,000. These additional revenues were to be realized by an increase in base rates which would produce an additional $7,124,000 and by a change in a fuel adjustment clause which would result in another revenue increase of $1,765,000. On January 24, 1972, the PUC found Narragansett's requested increase of $8,889,000 excessive, unjust and unreasonable and issued an order, Docket No. 1076, allowing Narragansett a revenue increase of $6,448,000.

The following day, January 25, 1972, officials from Narragansett obtained a meeting with members of the PUC to discuss the implications of the order. The Rhode Island Consumers' Council was neither informed of nor represented at the *ex parte* conference. The meeting consisted of an extensive discussion between members of the PUC and officials from Narragansett only. On January 27, 1972, Narragansett presented to the PUC the rates it had filed in response to the PUC's order allowing a $6.4 million revenue increase. The Consumers' Council was informed of this meeting and sent a representative to it. At this meeting, no mention was made of the previous meeting at which the Consumers' Council was not present. On January 28, 1972, the PUC issued an order approving the rates Narragansett had filed and placing them into effect on that date.

In January of 1975, the Attorney General asked the PUC to investigate Narragansett's implementation of the 1972 rate order. The PUC agreed to investigate and conducted extensive hearings on the matter. In its decision below, the PUC found that the meeting held on January 25, 1972, was an *ex parte* meeting in violation of the State Administrative Procedures Act and that the rates which Narragansett implemented on January 28, 1972, were in substantial noncompliance with the PUC's order of January 24, 1972.[1] The PUC also found that its order allowing a $6.4 million revenue increase meant that

[1] R.I. Gen. Laws 1956 (1977 Reenactment) § 42-35-13 provides:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate . . ..

the total revenue increase was to equal that amount. To the extent that Narragansett's rates were calculated to yield more, $7.8 million, those rates were excessive, unjustified and unreasonable. Therefore, $1.4 million was considered improperly collected by Narragansett.

The PUC determined that Narragansett procured the PUC's order of January 28, 1972, which placed the unlawful rates into effect by obtaining an illegal, *ex parte* meeting with the PUC in violation of the Rhode Island Administrative Procedures Act. Narragansett failed to disclose to the participants at the January 27, 1972, meeting what transpired at the *ex parte* meeting or the actual effect of the rates Narragansett filed on January 28, 1972. Thus, the PUC concluded that since its January 28 order was based on the misunderstanding it was given at the *ex parte* meeting, the order was invalid to the extent that it purported to allow rates which collected revenue over $6.4 million. Narragansett was ordered to refund to its customers the money it had wrongfully collected which exceeded the $6.4 million figure.

The Rhode Island Supreme Court granted the petition for writ of certiorari filed by Narragansett and, after reviewing the briefs submitted by both parties, entertained oral argument on the issues. The high court of Rhode Island found that the record of the PUC's investigatory hearing supported a finding that an *ex parte* meeting had occurred on January 25, 1972, in violation of Rhode Island law. However, the court refused to uphold the PUC's order of a refund to the customers injured by the excessive revenue increase and allowed Narragansett to retain the $1.4 million it had improperly collected from the customers.[2]

[2] Simultaneously with his request for an investigation, the Attorney General commenced a civil action against Narragansett in the Rhode Island Superior Court under R.I. Gen. Laws 1956 (1977 Reenactment) § 39-2-7. The statute provides that a public utility is civilly liable for harm resulting from

Reasons for Granting the Writ.

I. DUE PROCESS MANDATES THAT THE NARRAGANSETT ELECTRIC COMPANY BE ORDERED TO REFUND REVENUES PAID BY ITS CUSTOMERS IN EXCESS OF THE RATES ORIGINALLY INTENDED BY THE PUBLIC UTILITIES COMMISSION IN ITS JANUARY 24, 1972, ORDER.

It is axiomatic that due process restrains government action which denies persons liberty or property interests within the context of the Due Process Clause. *See Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Once the elements of the Due Process Clause — governmental action and deprivation of a protected interest — are present, in a particular set of circumstances, the procedural limitations will be imposed. Of course, the nature of the facts in issue must be appropriate for a hearing, and the Due Process Clause does not proscribe deprivation of every interest a person might have. *Paul* v. *Davis*, 424 U.S. 693 (1976). A utility consumer must demonstrate initially that he has been deprived of a constitutionally recognized interest by state action before he can challenge his denial of a refund. While courts have been reluctant to hold that a utility rate increase or the denial of a refund deprives a consumer of his Fourteenth Amendment right, the procedural due process protections may be expanded to provide protection in this situation.[3] The issue becomes one of constitutional dimension and

any act done in violation of the public utility laws and that any person, firm, or corporation injured thereby has three years from the time the cause of action accrues to bring the suit. The Superior Court dismissed the action on the ground that the PUC had exclusive jurisdiction to determine this controversy. Since the Rhode Island Supreme Court recognized that the January 25, 1972, meeting was an *ex parte* meeting in violation of the State Administrative Procedures Act and refused to allow the customers to recoup the loss sustained as a result of the improper rates charged, the court deprived the customers of the only remedy available to them.

[3]See Craft, *Due Process Restraints on the Use of Automatic Adjustment Clauses in Utility Rate Schedules*, 18 Ariz. L. Rev. 453, 459 (1976).

requires a careful analysis of the hearings held prior to a rate increase to assure fairness. In order to resolve that issue, this Court has stated that essential considerations are "whether the . . . procedures provided . . . are constitutionally sufficient . . . [and] analysis of the governmental and private interests that are affected." *Mathews* v. *Eldridge*, 424 U.S. at 334.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." In 1883, this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), affirmed the essential dichotomy between action by the *state* subject to scrutiny under its provisions and *private conduct*, however discriminatory or unfair, against which the Fourteenth Amendment provides no shield. *See also*, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). This Court introduced the total involvement test in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and called for judicial consideration of the aggregate effect of the activities, obligations, and responsibilities of the private entity in determining whether state action is present. *See* Comment, *Public Utilities and State Action*: *The Supreme Court Takes a Stand*, 24 Cath. U. L. Rev. 622, 626-632 (1975).

However, this Court found no state action in the termination of electrical service by a privately owned but carefully regulated utility in its fairly recent *Jackson* decision, 419 U.S. at 345. The Court employed the nexus test to require that the state be sufficiently involved in the specific activity that it "may fairly be treated as . . . [an action] of the State itself." *Id.* at 351.

The Attorney General submits that even if this Court adheres to the more stringent *Jackson* test for ascertaining state action, the hurdle in securing due process review of a situation where the Supreme Court of Rhode Island found a wrong but afforded no remedy to the consumer should not be insur-

mountable. The only link between the Pennsylvania agency and the termination regulation in *Jackson* was the filing of termination procedures by Metropolitan Edison Company with the commission and the lack of any commission action to remove them. In addition, the subject regulation had not been the subject of an agency hearing nor had it come under scrutiny by the commission.

In contrast, ratemaking is one of the primary duties of the Rhode Island Public Utilities Commission. *See* R.I. Gen. Laws 1956 (1977 Reenactment) §§ 39-3-1 et seq. Specifically, § 39-3-10 provides as follows:

> Every public utility shall file with the public utility administrator within a time to be fixed by the administrator, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. A copy of so much of said schedules as the administrator shall deem necessary for the use of the public shall be printed in plain type, or typewritten, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public in such form and place as to be readily accessible and conveniently inspected, and as the administrator may order. The administrator may determine and prescribe the form in which the schedules, required by this section to be kept open to the public inspection, shall be prepared and arranged, provided, that with respect to public utilities subject to the federal "Act to regulate commerce," so-called, the form of such schedules shall be that from time to time prescribed by the interstate commerce commission.

State involvement, therefore, differs from the *Jackson* fact pattern, where the Supreme Court emphasized that the commission had not "put its own weight on the side of the proposed practice by ordering it." *Id.* at 357. Here, the rates charged the consumer resulted from government deliberation, approval or disapproval, and orders, and, as a result, there is state action.[4]

The next obstacle to overcome to achieve due process review involves consideration of whether the consumer has been deprived of a cognizable property interest in Fourteenth Amendment terms. As this Court stated in *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), "due process is flexible and calls for such procedural protections as the particular situation demands."

It is clear that the Fourteenth Amendment does not include a definition of the property it protects. Not all property interests of persons are protected, but money has always been recognized as protected property. For example, in *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969), the majority opinion made it explicit that the property constitutionally recognized was the use of the garnished portion of a person's wages during the interim period between the garnishment and the culmination of the lawsuit involved. In recent years, it appears that this Court has read the word "property" rather expansively and adopted the doctrine of entitlement. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

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[4]Utility consumers have encountered no recent problems in challenging rates under the Fourteenth Amendment regarding state action. *See, e.g., Hartford Consumer Activists Ass'n* v. *Hausman*, 381 F. Supp. 1275 (D. Conn. 1974); *Sellers* v. *Iowa Power & Light Co.*, 372 F. Supp. 1169 (S.D. Iowa 1974); *City of Norfolk* v. *Virginia Elec. & Power Co.*, 197 Va. 505, 90 S.E. 2d 140 (1955).

> To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. *Roth*, 408 U.S. at 577.

Thus, it seems that this principle of entitlement will determine the consumer's eligibility to be safeguarded by the Due Process Clause. This Court read broadly what constitutes an entitlement in the recent case of *Goss* v. *Lopez*, 419 U.S. 565 (1975). In *Goss*, the Court found that high school students suspended for ten days had legitimate claims of entitlement to a public education. The Court arrived at entitlement by looking at a statutory framework and finding a legislative intent to confer a benefit on the students. It seems that the utility consumer may look to state statutes for an entitlement to particular rates. A careful review of R.I. Gen. Laws 1956 (1977 Reenactment) §§ 39-3-10 thr ugh 13 reveals that the state through its legislation entitles the consumer to rates established in accordance with the prescribed procedures. It follows that the consumer is entitled to a refund where the rate was determined illegally. App. 7a-9a.[5]

Moreover, a person is required to purchase utility service, which is a necessity of modern life, from a monopoloid utility licensed by the state. Therefore, the consumer has no real choice in the price he pays for electricity. This Court should have no difficulty in recognizing the utility consumer's entitlement to pay rates which yield a fair rate of return and which have been legally established and imposed.

[5]R.I. Gen. Laws 1956 (1977 Reenactment) § 39-3-13.1 was enacted by 1975 R.I. Pub. Laws c. 276, § 1, authorizing the PUC to order refunds.

As this Court is aware, after due process has been shown to apply, the type of process that is due must be determined. *Morrissey*, 408 U.S. at 481. This Court has articulated a balancing of interests approach to determine the mandate of due process in each set of circumstances. *Mathews* v. *Eldridge*, 424 U.S. at 335.

It is a fundamental precept of fair process — as applicable to administrative adjudication as to proceedings in the courts — that the adjudicatory process be carried on in the open and that nothing should be taken into account in arriving at a decision on a contested issue of fact that has not been introduced into the record and exposed to refutation, exploration through cross-examination or explanation by the parties. This basic principle of all adjudication, judicial and administrative alike, manifests itself in the well-settled prohibitions against *ex parte* communications and evidence *dehors* the record. This principle received perhaps its most definitive recognition in *Morgan* v. *United States*, 304 U.S. 1 (1938). In *Morgan*, the Court set aside an order of the Secretary of Agriculture fixing certain maximum rates for buying and selling livestock on the ground that the Secretary's *ex parte* consultation with the persons who prepared the government's case violated the principles of fundamental fairness. The Court cogently observed:

> Congress, in requiring a "full hearing," had regard to judicial standards, — not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. *Id.* at 19.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-

judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For . . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. *Id.* at 22.

In *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D.C. Cir. 1959), the United States Court of Appeals for the District of Columbia relied on its earlier remand order in *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 261 F. 2d 55 (D.C. Cir. 1958), and vacated an order of the Federal Communications Commission because of *ex parte* contacts by an F.C.C. regulatee with members of that commission. Significantly, the court rejected the argument that, since the issue before the commission was a matter of rulemaking, *ex parte* attempts to influence the decision should not invalidate that decision. The court held that because the F.C.C.'s decision involved "resolution of conflicting private claims to a valuable privilege, . . . *basic fairness* requires such a proceeding to be carried on in the open." *Sangamon Valley Television*, 269 F. 2d at 224 (emphasis supplied).

In a pair of very recent decisions, *Action for Children's Television (ACT)* v. *F.C.C.*, 564 F. 2d 458 (D.C. Cir. 1977), and *Home Box Office, Inc.* v. *F.C.C.*, 567 F. 2d 9 (D.C. Cir. 1977), the court exhaustively treated the status of *Sangamon*, and the breadth of its reach today. A careful reading of these opinions, together with the history of the developing law prohibiting *ex parte* contacts, suggests that, at least in the federal realm, such contacts are absolutely prohibited, and if made

will vitiate the agency's ensuing order in all proceedings before administrative agencies except informal rulemaking; and even in the case of informal rulemaking *ex parte* consultations will vitiate an agency's order if it appears that they "may have materially influenced the action ultimately taken." *ACT* v. *F.C.C.*, 564 F. 2d at 476.

The principles of exclusiveness of the record and prohibition of *ex parte* consultations clearly are embodied in the laws of Rhode Island. The Administrative Procedures Act, R.I. Gen. Laws 1956 (1977 Reenactment) §§ 42-35-1 et seq., provides that the record in a contested case shall include all evidence received or considered and that an agency's findings of fact in a contested case shall be based exclusively on the evidence and matters officially noticed. Further, § 42-35-13 specifically prohibits *ex parte* consultations:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate; but any agency member
>
> (a) may communicate with other members of the agency, and
>
> (b) may have the aid and advice of one or more personal assistants.

In its decision below, the Supreme Court of Rhode Island held the meeting of January 25, 1972, to be an illegal *ex parte* consultation. App. at 7a-8a. The Attorney General argues

that the fundamental fact of that meeting is that Narragansett went in to discuss an issue that meant $1.4 million in annual charges to its customers, the difference between a $6.4 million increase and a $7.8 million increase. App. at 2a-3a. It is clear that Narragansett took full advantage of its *ex parte* meeting to attempt to resolve the issue before the PUC. Such process shocks the conscience.

In balancing the interests, several factors must be weighed in favor of the consumer. The consumer was denied full and fair scrutiny of Narragansett's rate as well as the refund to which he was clearly entitled. The financial hardship may be severe; since the consumer has no alternative source of electrical power, he is forced to reduce his consumption or other items in his budget.

The public interest clearly includes avoiding the administrative burden and costs associated with requiring Narragansett to award a refund. Clearly, each hearing increases the cost of regulatory agencies. However, costs alone do not control whether due process mandates a particular procedure. *Mathews*, 424 U.S. at 347-348.

The government's interest in providing adequate utility service could be effected by requiring a full and fair adjudicative procedure and the payment of a refund when excessive and illegal rates are charged by the utility. While financial stability is necessary for the survival of Narragansett, it need not be accomplished at the expense of the consumer.

Sharply rising utility bills in a troubled economy necessitate reconsideration of the issue presented in this case. Considering the overall balance of interests, it is clear that due process demands protection of the consumer's interest in reasonable rates and his entitlement to a refund when the rates are illegal and excessive. Whether the benefits of safeguards and a remedy outweigh the costs and injustice suffered can only be resolved under the United States Constitution.

II. The Rhode Island Supreme Court Erred in Failing to Uphold the Commission's Award of Relief to the Customers Injured by the Excessive Rates that Narragansett Electric Company Charged Them.

On August 21, 1978, the PUC ordered Narragansett to refund its customers approximately $1.4 million it had improperly collected in rates. It found that the order allowing these rates resulted from proceedings involving an *ex parte* meeting which violated the state statutory law and from a misunderstanding on the part of its members as to the amount of revenue the rates would produce for Narragansett. The Rhode Island Supreme Court agreed that the proceedings leading to the order allowing the rates involved an *ex parte* hearing that violated the statutory requirement of notice to all parties involved.[6] However, the state court erred in quashing the PUC order which commanded Narragansett to refund the money in dispute.

The State Supreme Court relied upon the principle first enunciated by this Court in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932), and adopted in Rhode Island in *New England Tel. & Tel. Co.* v. *P.U.C.*, 116 R.I. 356, 358 A. 2d 1 (1976), of nonretroactivity of the ratemaking powers of a regulatory commission. In *Arizona Grocery*, a distinction was made between the legislative and the judicial functions performed by a regulatory commission, in that instance the Interstate Commerce Commission. When acting in a legislative capacity, a regulatory commission determines whether a rate for the future is reasonable and just. When acting in a judicial capacity, it decides whether the legal rate is lawful. In *Arizona Grocery*, the Court concluded that where the commission has properly exercised its legis-

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[6]See footnote 1: R.I. Gen. Laws 1956 (1977 Reenactment) § 42-35-13.

lative powers by fixing the lawful rates for the future, it cannot, in its judicial capacity, disturb its finding of lawfulness. However, when the rates under review were not properly legislated, i.e., were not the result of a valid order and were, therefore, utility-made, the commission may exercise its judicial functions and adjust the rates retroactively.

> As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation. *Arizona Grocery*, 284 U.S. at 388.

The $1.4 million in question resulted from rates purportedly allowed by the PUC's order of January 28, 1972. However, as the PUC correctly found, that order was void as a matter of law. The January 28, 1972, order placed into effect rates submitted on that day. The PUC presumed these rates were in compliance with its order of January 24, 1972, allowing Narragansett a total revenue increase of $6.4 million to be derived from a change in base rate and the fuel adjustment clause. Moreover, the order resulted from proceedings involving an *ex parte* meeting held on January 25, 1972, which was prohibited by the State Administrative Procedures Act. Under such circumstances, the $1.4 million in excess of the $6.4 million was not properly approved by the PUC and not a commission-made revenue increase. Therefore, the *Arizona Grocery* situation is not present in the instant case.

The Fifth Circuit Court of Appeals has stated:

> It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. *Callery Properties, Inc.* v. *F.P.C.*, 335 F. 2d 1004, 1019 (5th Cir. 1964), rev'd on other grounds *sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965).

The rates allowed in this case resulted from an invalid order and, therefore, the PUC had the authority in its judicial capacity to afford reparation to those injured by the illegal activity.

As previously discussed, the principle that a regulatory agency cannot retroactively amend its orders which were found to be reasonable and just in a prior proceeding is not absolute. A fundamental tenet of the adversary process is that one party to an administrative proceeding may not engage in an *ex parte* communication with members of the agency. To engage in a communication of this nature is a violation of the other party's right to due process of the law guaranteed by the Fourteenth Amendment to the Federal Constitution.

In *Morgan* v. *United States*, 304 U.S. 1, 19-20 (1938), this Court stated:

> If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or

consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The wrongness involved in holding an *ex parte* hearing is so fundamental that the entire agency proceeding is considered tainted and any order emanating from the proceeding is invalid. *See Camero* v. *United States*, 179 Ct. Cl. 520, 375 F. 2d 777 (1967); *Brown* v. *United States*, 377 F. Supp. 530 (N.D. Tex. 1974): both involved the reinstatement of federal employees with back pay after determinations that *ex parte* communications had occurred between the adjudicators and representatives of the employers. Accordingly, the existence of an *ex parte* meeting in ratemaking proceedings resulting from noncompliance with statutory requirements of notice to the parties involved should also automatically result in the invalidation of any order resulting from such proceedings. *Moss* v. *C.A.B.*, 430 F. 2d 891, 902 (D.C. Cir. 1970).

The primary purpose of regulatory agencies is to protect the consumer. *California Gas Producers Ass'n* v. *F.P.C.*, 421 F. 2d 422, 428 (9th Cir. 1970); *Mesa Petroleum Co.* v. *F.P.C.*, 441 F. 2d 182, 186 (5th Cir. 1971). In carrying out this policy, the Federal Power Commission has the authority to make refunds to customers in compensation for improper acts done by utilities in the absence of specific statutory authority. "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F. 2d 153, 159 (D.C. Cir. 1967). Specific statutory language granting an agency the authority to order refunds is not necessary. When a statute grants a commission the discretionary authority to regulate rates, implicit in that authority is the right to develop remedies and sanctions necessary to effectuate the objectives of the law. Therefore, the authority to order refunds is implied in the general policy provisions of the state statute.[7]

Finally, the fundamental principles of equity mandate an award of relief to the customers injured by the excessive revenues collected by Narragansett. A regulatory commission has the authority to rely upon the principles of equity when acting

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[7] R.I. Gen. Laws § 39-1-1 provides in part:

> It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.
>
> To this end, there is hereby vested in the public utilities commission and the division of public utilities and carriers the exclusive power and authority to supervise, regulate and make orders governing the conduct of companies offering to the public in intrastate commerce energy, communication and transportation services and water supplies for the purpose of increasing and maintaining the efficiency of such companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling.

R.I. Gen. Laws § 39-1-38 provides in part:

> The provisions of this title shall be interpreted and construed liberally in aid of its declared purpose. The commission and the division shall have, in addition to powers herein specified, all additional, implied and incidental power which may be proper or necessary to effectuate their purposes. . . .

in a judicial capacity. *Niagara Mohawk*, 379 F. 2d at 160; *Mesa Petroleum Co.*, 441 F. 2d at 188. These principles are not within the sole province of the Court. *Id.* The PUC did what ought to be done in this instance. The State Administrative Procedures Act specifically prohibited the *ex parte* meetings under the circumstances found in this case. Therefore, any order emanating from proceedings involving an *ex parte* meeting is void. An award of relief through a refund is what ought to be done in this instance, and fairness to the customers involved demands this action.

Conclusion.

For the reasons stated above and in the interest of justice and the fair administration of law, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

STATE OF RHODE ISLAND.

Supreme Court.

THE NARRAGANSETT ELECTRIC COMPANY

v. No. 78-319 — M.P.

EDWARD F. BURKE ET AL.

Opinion.

BEVILACQUA, C. J. The Narragansett Electric Company (Narragansett) has petitioned this court for a writ of certiorari requesting us to review and quash the August 21, 1978 order of the Public Utilities Commission (PUC). The petitioner also seeks our termination of the PUC investigation requested by the Attorney General, who alleged that Narragansett had overcharged its customers by improperly implementing a rate increase granted by the PUC in a January 24, 1972 order.

Prior to 1967, Narragansett supplied electricity partly from its own generator and partly from power purchased from the New England Power Company (NEPCO). During this period, Narragansett operated under a fuel adjustment clause. This clause, which was applied to rates charged of commercial and industrial enterprises, adjusted the price of electricity whenever the cost of fuel utilized by Narragansett rose above or fell below $10.75 per standard net ton. When the cost rose above the $10.75 base rate, Narragansett would recover the amount for its extra outlays from its commercial and industrial customers. When the cost of fuel fell below the base rate price, the fuel clause operated to reflect that difference in credits on the bills of those customers.

In 1967, Narragansett contracted to sell all of the output from its generating plants to NEPCO. Under the terms of this "Integrated Facilities" contract, all of Narragansett's generating costs, including the cost of fuel, were paid by NEPCO. According to the PUC, because the fuel adjustment clause remained in effect under this contract and because the cost of fuel fell approximately $2 below the base rate price, the clause implemented customer credits with no corresponding decrease in fuel costs. This resulted in a situation whereby Narragansett's cost of service was artificially inflated, thus depressing Narragansett's earnings. Recognition of these credits by Narragansett contributed to its November 30, 1970 request for rate relief.

On this date, Narragansett asked the PUC to permit it to increase its rates by $8,899,000 (Docket 1076). These additional revenues, which were based upon a 1970 test year, were to be achieved by a combination of a $7,124,000 increase in base rates and a change in the fuel adjustment clause amounting to $1,765,000. The fuel clause was thus recalculated by lowering the base cost of fuel, so that Narragansett would not have to issue credits in the future for the differential that existed during the test year.

The PUC issued a summary order on January 24, 1972, granting Narragansett additional revenues of $6,448,000. Two days later Narragansett filed new rates in compliance with the January 24, 1972 order. The PUC approved this filing in an order issued on January 28, 1972.

On January 28, 1975, the Attorney General requested the PUC investigation that led to this petition for certiorari. In his request, the Attorney General contended that Narragansett had implemented rates generating $7.8 million, or $1.4 million more than the $6.4 million rate revenues allowed by the PUC in its January 24, 1972 order. Narragansett responded that although the implemented rates would have generated

$7.8 million over revenues earned in 1970, the new rates only generated additional revenues of less than $6.4 million when they became effective on January 28, 1972.

Before the PUC, attention focused on the revenue impact caused by substitution of the new fuel adjustment clause for the old fuel clause. Both parties agreed that implementation of the new fuel clause would have produced $1,765,000 in additional revenue during the 1970 test year. Narragansett, however, asserted that elimination of the old fuel clause during 1972 resulted in much less revenue. Narragansett attributed this result to the delay of the PUC in issuing the order due to the 1971 Presidential price freeze, the outdated test year, Narragansett's rapidly deteriorating financial condition and rising fuel costs.

The PUC found that on the basis of these factors, Narragansett implemented rates that allowed only $359,000 of additional revenues from the fuel clause change, instead of $1.7 million, thus permitting it to increase the base rates by $6,089,000. The problem that ultimately resulted in this certiorari proceeding is that the facts leading to Narragansett's decision to estimate the fuel clause at the $359,000 amount were not raised at the hearing before the PUC and thus do not appear in the record of Docket 1076. Instead, claiming uncertainty as to exactly what portion of the $6.4 million was to be attributed to elimination of the old fuel clause, Narragansett requested the PUC to clarify its order in what the Attorney General describes as an ex parte meeting. Specifically, Narragansett wanted to inquire whether the January 24, 1972 PUC order was based on test year fuel costs so that $1.7 million of the $6.4 million would be attributed to elimination of the old fuel clause, entitling Narragansett to increase its base rates by only $4.7 million, or based upon the then current fuel costs so that Narragansett could increase its base rates by approximately $6.1 million. In the latter event, Narragansett would adopt

its "fuel normalization plan," designating $359,000 instead of $1.7 million to elimination of the old fuel clause, thus taking test year (1970) revenues and normalizing those revenues to reflect December 1971 fuel costs.

The attorney for the Consumers' Council was neither informed of nor attended this meeting, held on January 25, 1972. It is this absence that resulted in the meeting's alleged ex parte status pursuant to G.L. 1956 (1977 Reenactment) § 42-35-13.[1] At the meeting, a Narragansett representative took notes to the effect that chairman Smith responded that the test year fuel clause credit was entirely separate from the $6.4 million awarded by the PUC on January 24, 1972. Chairman Smith also instructed Narragansett to implement its final rate design in accordance with its fuel normalization plan. Before doing so, however, Narragansett met with the Consumers' Council on January 27, 1972 to explain its fuel normalization plan. The PUC approved of these rates implemented by Narragansett on January 28, 1972.

Three years later, the Attorney General requested the PUC to order Narragansett to refund all revenues it had received in excess of the $6.4 million that the PUC found to be reasonable. The Attorney General stressed that a refund was necessary because Narragansett had implemented rates representing a $7.8 million increase. The Attorney General also alleged that Narragansett had wrongfully persuaded the PUC to find that the rates filed pursuant to the fuel normalization plan were in

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[1] General Laws 1956 (1977 Reenactment) § 42-35-13 provides in pertinent part as follows:

> "members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate * * *."

compliance with its order. Moreover, the Attorney General claimed that the presentation at the meeting of January 27, 1972 to explain the rates to the Consumers' Council was incomplete, superficial and misleading.

The PUC found that the record did not warrant a finding that Narragansett had perpetrated a fraud upon the PUC or that any misrepresentation had occurred that alone would warrant setting aside the rates. Nevertheless, the PUC also decided that because the January 24th order was subject to two interpretations, the subject matter of the meeting fell within the definition of a contested case; that the January 25th meeting was not limited to a request for clarification; and that the January 25th meeting therefore possessed ex parte status. The PUC further found that the disclosure meeting of January 27 did not cure the injury or prejudice suffered by the Consumers' Council. The PUC thus ordered Narragansett to refund all revenues collected in excess of those it would have earned had the rates been implemented as authorized by the PUC's decision and order of January 24, 1972 and of March 6, 1972.

In its petition for certiorari, Narragansett argues (1) that the January 25, 1972 meeting was not an illegal, ex parte meeting; (2) that assuming *arguendo* a technical violation of the ex parte statute, the PUC erred in voiding the January 28, 1972 order; (3) that the PUC has no power to award refunds or reparation; and (4) that the PUC erred in holding that Narragansett's compliance rates were unjust and unreasonable. In view of our answer to Narragansett's second and third allegations, which we have discussed concurrently below, we need not address Narragansett's fourth argument.

I

In support of its position that the January 25th meeting was not an illegal, ex parte communication, Narragansett main-

tains that the meeting was held merely for the sake of clarifying the January 24th order and that no issue of law or fact was presented for decision by the PUC necessitating a hearing. Narragansett's analysis thus removes the subject matter of the meeting from the Administrative Procedures Act [G.L. 1956 (1977 Reenactment) chapter 35 of title 42] definition of "contested case"[2] and places it within the parameters of this court's decision in *Town of Charlestown* v. *Kennelly*, 80 R.I. 148, 93 A.2d 728 (1953). In *Kennelly*, the public utilities administrator directed the telephone company to submit for his approval a schedule of rates designed to implement his earlier order. We stated that although the better procedure would have dictated giving the opponent an opportunity to be heard on whether the rates conformed with the findings in the PUC decision and its first order, there was no statutory requirement to that effect and no prejudice had actually resulted. We therefore held that no new notice was required before entry of the order effectuating the administrator's decision. In the instant case, Narragansett contends that the PUC, which found that an issue of law or fact existed that could have seriously altered implementation of the rate award, erred in deciding that *Kennelly* did not apply to the alleged clarification meeting.

In G.L. 1956 (1977 Reenactment) § 39-5-3,[3] the General Assembly defined the framework within which this court reviews

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[2]General Laws 1956 (1977 Reenactment) § 42-35-1(b) defines "contested case" as follows:

> "a proceeding, *including but not restricted to ratemaking*, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing." (Emphasis added.)

[3]General Laws 1956 (1977 Reenactment) § 39-5-3 reads as follows:

> "Findings of commission. — The findings of the commission on questions of fact shall be held to be prima facie true and as found by the commission and the supreme court shall not exercise its independent judgment nor weigh conflicting evidence. An order or judgment of the commission made in the exercise of administrative discretion shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily or unreasonably."

PUC decisions. Under this statutory mandate, we determine whether the decision of the PUC is lawful and reasonable. In so doing, we do not exercise our independent judgment or weigh conflicting evidence, and we will not disturb administrative findings unless the record establishes that the findings are not fairly and substantially supported by legal evidence. *Providence Gas Co. v. Burke,* R.I. , , 380 A.2d 1334, 1339 (1977); *New England Telephone & Telegraph Co. v. PUC*, 118 R.I. 570, 575, 376 A.2d 1041, 1044 (1977); *United Transit Co. v. Public Utility Hearing Board*, 96 R.I. 435, 445, 192 A.2d 423, 428-29 (1963). *See* G.L. 1956 (1977 Reenactment) § 39-5-3. In order to disturb an administrative order, we must be satisfied that the PUC acted illegally, arbitrarily or unreasonably. *See Providence Gas Co. v. Burke,* R.I. at , 380 A.2d at 1339; *New England Telephone & Telegraph Co. v. PUC*, 118 R.I. at 578-79, 376 A.2d at 1044. *See also* § 39-5-3. Therefore, if we decide that the PUC erred in finding that an ex parte meeting occurred, or that the PUC acted in excess of its jurisdiction in voiding its January 28, 1972 order and in demanding a refund, then we must quash the PUC's second, remedial order of August 21, 1978, thus permitting its January 28, 1972 order to stand.

We believe that the record clearly supports the finding by the PUC that an ex parte meeting occurred. The testimony of Edward F. Hindle, attorney for Narragansett, establishes that notwithstanding any lack of intent on the part of T. Dexter Clarke, president of Narragansett, to raise a new proposal, the topic of fuel normalization was initially broached at the meet-

ting on January 25. The testimony of William McDade, a senior rate engineer at New England Power Service Company, who prepared testimony and exhibits for Narragansett, substantiates that an additional rate design measure via fuel normalization was proposed on January 25. This fact distinguishes the present situation from the approval meeting held in the case of *Town of Charlestown v. Kennelly, supra.* Even Mr. Hindle admitted that the subject matter of the January 25th meeting had extended farther than he had anticipated. Because the PUC was asked to approve implementation of the fuel normalization plan, which would result in Narragansett earning a greater revenue than had the 1970 test year fuel adjustment clause estimates been used, the process of ratemaking was technically still in progress. The meeting of January 25 thus fell within the definition of "contested case" contained in § 42-35-1(b), so that all parties involved were entitled to an opportunity for a hearing after reasonable notice pursuant to § 42-35-9.[4] At the close of the meeting, the PUC instructed Narragansett to implement its fuel normalization plan, thus allowing Narragansett an increase in revenues over the test year by $1.4 million. Because "the legal rights, duties, or privileges" of both Narragansett and the public were determined without a hearing, the proceeding violated § 42-35-13, which prohibits agency members from communicating with any person or his representative concerning their prospective findings of fact or decisions of law in a contested case absent

[4]General Laws 1956 (1977 Reenactment) § 42-35-9 reads, in pertinent part, as follows:

> "(a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
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> * * * * * * *
>
> "(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved * * *."

notice and an opportunity for all parties to the case to participate.[5] We therefore hold that the finding of the PUC that the January 25 meeting extended farther than a mere request for clarification and thus violated the prohibition against ex parte meetings is fairly and substantially supported by legal evidence.

II

Despite the fact that an ex parte meeting occurred, the PUC acted in excess of its jurisdiction when it voided its order of January 27, 1972 and ordered Narragansett to refund the amount of revenues collected in excess of those that would have been collected had the rates been designed to comply with the January 24, 1972 order and the March 6, 1972 decision. Although violations of the ex parte prohibition in other factual contexts have led courts to void the agency order or decision, *see, e.g., Camero v. United States,* 375 F.2d 777, 780-81 (U.S. Ct. Cl. 1967); *WKAT, Inc. v. FCC,* 296 F.2d 375, 382-83 (D.C. Cir. 1961); *Sangamon Valley Television Corp. v. United States,* 269 F.2d 221, 224-25 (D.C. Cir. 1959); we choose to follow contrary precedent in a ratemaking setting such as the one before us.

In Rhode Island, although ratemaking is legislatively defined as a quasi-judicial function,[6] *see Blackstone Valley Chamber of Commerce v. PUC,* R.I. , , 396 A.2d 102, 104 (1979), *citing Narragansett Electric Co. v. Harsch,*

[5]For the text of § 42-35-13, see note 1, *supra.*

[6]General Laws 1956 (1977 Reenactment) § 39-1-3 provides in pertinent part:

> "The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to hold investigations and hearings involving the rates, tariffs, tolls and charges * * * of * * * electric * * * public utilities * * *."

117 R.I. 395, 401, 368 A.2d 1194, 1201 (1977), it is well settled that rates are exclusively prospective in nature and that future rates may not be designed to recoup past losses.[7] *See Narragansett Electric Co. v. Burke*, R.I. , , 381 A.2d 1358, 1364 (1977); *New England Telephone & Telegraph Co. v. PUC*, 116 R.I. 356, 388, 358 A.2d 1, 20 (1976). This rule is grounded upon the principle that "when a commission pronounces that a specific rate is a 'reasonable and lawful rate for the future,' that pronouncement has the force and effect of a statute." *New England Telephone & Telegraph Co. v. PUC*, 116 R.I. at 388, 358 A.2d at 20. The rule that rates are exclusively prospective was first enunciated by the Supreme Court in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932). In *Arizona Grocery Co.* the Court held that a public utilities commission cannot repeal its own earlier-approved rates by later finding them unreasonable. The Court posited that the rates allowed by the commission had the force and effect of a statute upon which the utility was entitled to rely. *Id.* at 386, 389, 52 S.Ct. at 185, 186, 76 L.Ed. at 354, 355. Application of any other rule would encourage each ratemaking hearing to continue indefinitely, encouraging waste of administrative time and resources and discouraging reliance on commission decisions.

We therefore hold that the PUC acted illegally in voiding its order of January 27, 1972, and in ordering Narragansett to refund revenues paid by customers in excess of the rates originally intended by the PUC in its January 24, 1972 order.

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[7]This rule has been relaxed only to permit the utility to belatedly collect rates that became presently due where the utilities commission was remiss in its statutory duty. The doctrine, however, has never allowed a utility to recoup retroactively revenues lost even when they are lost due to the fault of the commission. *See Bristol County Water Co. v. PUC*, 117 R.I. 89, 98 n.2, 363 A.2d 444, 449 n.2 (1976).

Although the rationale behind the rule that rates are exclusively prospective is to avoid doing injustice to those who rely on PUC rate orders, the result engendered by use of the rule in this case may appear inequitable to the customers who paid the excessive rates. We note, however, that although there has been an ex parte communication in violation of § 42-35-13,[8] this section applies only to members and employees of the particular agency, not to interested parties such as Narragansett.[9] It is thus the PUC, not the representatives of Narragan-

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[8]G.L. 1956 (1977 Reenactment) § 42-35-13 reads as follows:

> "Ex parte consultations. — Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate; but any agency member
> (a) may communicate with other members of the agency, and
> (b) may have the aid and advice of one or more personal assistants."

[9]Parties interested in the outcome of the dispute do not fall within the prohibition of § 42-35-13. In this manner the Rhode Island statute is more limited than its federal counterpart, 5 U.S.C.A. § 557 (1977). The federal version of § 42-35-13 contains not only a subsection that parallels the § 42-35-13 prohibition against communications instigated by the agency, but also a subsection prohibiting all interested persons from engaging in ex parte communications with members or employees of the agency or an administrative judge. *Compare* § 42-35-13 (*see* note 8, *supra*) *with* 5 U.S.C.A. §§ 557(d)(1)(A) and (B) at 352 (1977), which read as follows:

> "(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
> "(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or

sett, that has violated the prohibition of § 42-35-13 by mistakenly permitting the clarification meeting to metamorphose into an ex parte communication. Although the PUC may now wish to remedy its over-sight, it remains subject to the judicially-created, commission-made rate doctrine until the General Assembly declares otherwise. As a creation of the General Assembly, the PUC derives all of its powers, duties and responsibilities from its enabling act. *Bristol County Water Co. v. PUC*, 117 R.I. 89, 97, 363 A.2d 444, 449 (1976).

Although the General Assembly amended the Public Utilities & Carriers Act in 1975, giving the Division of Public Utilities and Carriers the power to order refunds, *see* § 39-3-13.1,[10] it is the rule in Rhode Island that absent legislative guidance to the contrary, a statute will not be given retroactive application if it creates, defines and regulates substantive legal rights. *See Fox v. Fox*, 115 R.I. 593, 596-97, 350 A.2d 602, 604 (1976); *Cipriano v. Personnel Appeal Board*, 114 R.I. 141, 144, 330 A.2d 71, 73 (1975); *Norton v. Paolino*, 113 R.I. 728, 733, 327 A.2d 275, 278 (1974). Because § 39-3-13.1 affects a vested substantive right, it is limited solely to

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knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding."

There is no companion section to § 557(d)(1)(A) in the Rhode Island statute.

[10] General Laws 1956 (1977 Reenactment) § 39-3-13.1 reads as follows:

"Power to order refunds. — The said division shall have the power, when deemed by it necessary to provide remedial relief from unjust, unreasonable, or discriminatory acts, or from any matter, act or thing done by a public utility which matter, act or thing is in chapter 1 to 5, inclusive, of this title, or otherwise, prohibited or declared to be unlawful, to order the said public utility to make restitution to any party or parties, individually or as a class, injured by said prohibited or unlawful acts, by way of a cash refund, billing credit or rate adjustment, or any other form of relief which the division may devise to do equity to the parties. Any award made in restitution shall carry interest from the date of the injury, at the rate of seven (7%) per cent from the date of the order of the division."

[11] For purposes of this discussion, we assume without deciding that § 39-3-13.1 applies to the PUC as well as to the Division of Public Utilities and Carriers.

prospective use by the PUC and therefore cannot be invoked in this case.[11]

For the reasons stated above, Narragansett's petition for certiorari is granted, the August 21, 1978 PUC order is quashed, and the record is remanded to the PUC with our decision endorsed thereon.